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84-1454

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 19__

NO. _____

MISSISSIPPI POWER & LIGHT COMPANY

Appellant

vs.

LOUIS A. CONERLY, ET AL

Appellees

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Miss. Code § 11-27-15, which effectively bars any utility from exercising the power of eminent domain if its proposed transmission line will be used primarily to transmit electricity out of state, is unconstitutional as imposing an impermissable burden on interstate commerce.

Whether a statute allowing a collateral challenge to the findings and order of a Public Service Commission after expiration of the time for a direct appeal and after public utilities have been led reasonably to rely on the finality of such findings and order, violates Fourteenth Amendment rights as a taking of property without due process of law.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 55,641) in the Supreme Court of Mississippi:

Mississippi Power & Light Company,
Plaintiff-Appellant

Louis A. Conerly
Gwendolyn R. Conerly
Lyndell R. Rushing
Frances S. Rushing
Merwin D. Wood
Sarah T. Wood
Ronald Mentel
Judith L. Mentel,
Defendants-Appellees

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 4 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following sections of the Mississippi Code (1972), which state in relevant part:

Section 77-3-11:

> (1) No person shall construct, acquire, extent or operate equipment for manufacture, mixing, generating, transmitting or distributing . . . electricity for intrastate sale to or for the public for compensation . . . without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

Section 77-1-41:

> Whenever any matter has been determined by the commission, in the course of any proceeding before it, the fact of such determination, duly certified, shall be received in all courts . . . as prima facie evidence that such determination was right and proper.

Section 11-27-47:

> All companies . . . incorporated or organized . . . for the purpose of

constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes . . . are hereby empowered to exercise the right of eminent domain. . . .

Section 77-3-5:

Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. . . .

Section 77-3-47:

The commission shall fix the time and place of hearings, if any is required, and shall serve notice thereof, not less than twenty days before the time set for such hearings, unless the commission shall find that public convenience and necessity requires that the subject hearings be held at an earlier date. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights. Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi.

At the time fixed for any hearing before the commission, or the

time to which the same may have been continued, the complainant and the person complained of shall be entitled in person or by attorney to be heard and to introduce evidence.

Section 77-3-67:

(1) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the chancery court, first judicial district of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in section 77-3-65 or, if the application is granted, within thirty days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper otice order any person to be joined as a party.

* * *

(4) The court may . . . sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may

be. . . . The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the Commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the Commission, or violates constitutional rights.

Section 11-27-15:

Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. . . .

Mississippi Constitution, Article 3, § 17:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a

use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

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ON APPEAL FROM THE
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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 460 So.2d 107 (Miss. 1984) and is set forth in the Appendix, infra, pp. 57a-79a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2),

this being an appeal which draws into question the validity of Mississippi Code (1972) §§ 11-27-15, 11-27-47 and 77-3-67, supra, on the ground that they are repugnant to the Constitution of the United States.

Appellant instituted proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, for condemnation of land to be used for construction of a high voltage electric transmission line. That court dismissed those proceedings. On appeal, the dismissal was affirmed on October 10, 1984. On December 12, 1984, Appellant's petition for rehearing was denied and the October 10 opinion was modified. As the Supreme Court of Mississippi on December 12, 1984, upheld the statutes and rejected Appellant's challenge to those statutes, as first construed by the Court on October 10, 1984, this matter is appropriately brought to this Court by appeal. See, e.g., Great

Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

In the event the Court does not consider appeal the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2103.

STATEMENT

Certification By the Commission

Prior to attempting to secure the right-of-way for the fifty-one mile high voltage line, Appellant applied to the Mississippi Public Service Commission ("the Commission") for a certificate of public convenience and necessity. Miss. Code § 77-3-11 required such application by a public utility proposing to build a line for any intrastate sale of electricity to or for the public. The high

voltage line that Appellant was building and for which the Commission issued its certificate of public convenience and necessity, was to be located entirely within the State of Mississippi. On October 20, 1981, the Commission issued its "Order Granting Certificate of Public Convenience and Necessity."

Miss. Code § 77-3-67 provides the method of appeal, and standard of review, of Commission orders or findings. No appeal was taken within the prescribed times.

Rulings of Special Court of Eminent Domain

Pursuant to this grant of certificate, Appellant proceeded to acquire the right-of-way for the high voltage line. This acquisition was made both by purchase and by exercise of the power of eminent domain. Prior to initiating the proceeding in question, Appellant had prosecuted to judgment, before this same Special Court and

judge, another eminent domain proceeding for this power line based upon the same certificate of public convenience. (App. at 16a-22a)

Appellant later filed four petitions for condemnation in the Special Court of Eminent Domain, pursuant to Miss. Code (1972) §§ 11-27-2, et seq., when four landowners in the path of the proposed right-of-way did not agree on a purchase price for the easement across their property. An electric utility such as Appellant had eminent domain rights pursuant to 11-27-47. In the Special Court of Eminent Domain proceedings, Appellant relied upon the Order Granting Certificate of Public Convenience and Necessity. (App. at 1a-15a) The Appellees filed their motions to dismiss.

On February 6, 1984, the Special Court filed its Order on Motions to Dismiss. That Court found that all of the electricity traveling through this high

voltage line would be sold to another utility, Louisiana Power & Light Company, and that no Mississippi consumer would be served directly off of this line. The Special Court found that Appellant based its eminent domain claim upon the Commission's certificate of public convenience and necessity. The Special Court ruled that because the power transmitted through this high voltage line would be sold "interstate" rather than to purchasers "intrastate," the Commission did not have jurisdiction, pursuant to § 77-3-51, to issue the certificate. The Special Court noted that the rates to be charged for electric power transmitted by this line would not be within the jurisdiction of the Commission but would be fixed by the Federal Energy Regulatory Commission. (App. at 24a, 27a)

Without deciding whether such a certificate would be required to build a line for the "interstate sale" of electricity,

the Special Court dismissed the eminent domain petitions.

Rulings of the Supreme Court of Mississippi

The Supreme Court of Mississippi affirmed the Special Court of Eminent Domain on several bases, including one not stated by the Special Court. The Supreme Court of Mississippi first found that prior to attempting to secure the right-of-way for this high voltage line, whether for intrastate sales or interstate sales, MP&L was required to obtain a certificate of public convenience and necessity from the Commission. Miss. Code § 77-3-11. (App. at 59a) The Court also found that the electricity which would be transmitted by the line would be sold only interstate, to Louisiana Power & Light Company and that the "primary purpose" of the line was to carry electricity interstate from the

Grand Gulf nuclear energy plant to Louisiana.

The Supreme Court of Mississippi interpreted Miss. Code § 11-27-15, which provides the grounds for dismissal of eminent domain proceedings, as precluding the exercise of the power of eminent domain by a public utility when the primary purpose of the facility or equipment to be constructed is "interstate sales." (App. at 62a-64a, 74a-79a).

Specifically, the Court held that the terms "the public necessity" and "public use" contained in § 11-27-15 "contemplate[d] use by the citizens of this state." (App. at 79a) Since the proposed transmission line would not directly serve any Mississippi customers, the Court ruled that the proceedings were properly dismissed.

The Court further ruled that the Appellees were not barred from attacking the findings and order of the Commission

by Miss. Code § 77-3-67, which provided that such findings and order could be challenged only a direct appeal within thirty days of the order.

How the Federal Questions Were Raised and Decided Below

The federal constitutional questions posed in this appeal were first injected into the case by the Supreme Court of Mississippi in its October 10, 1984 ruling. It was that decision which, for th first time, interpreted the terms "public necessity" and "public use" contained in Miss. Code § 11-27-15 as barring a utility from exercising the power of eminent domain if its proposed transmission line would be used primarily to transmit electricity out of state. Immediately after this decision, the Appellant, in its petition for rehearing, raised this bar to the use of eminent domain as an excessive burden on

interstate commerce. Since the petition for rehearing presented the first opportunity to raise this issue, the issue was timely raised.

It is clear that a constitutional issue may be first raised in the petition for rehearing when the grounds of the state court decision supply a new and unexpected basis for asserting a constitutional claim. Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932). This rule has been specifically applied to those situations in which the constitutional question arose from the state court's decision giving a statute a new construction that, for the first time brought it in conflict with the United States Constitution. Herndon v. Georgia, 295 U.S. 441, 442 (1935). This Court has ruled that in these cases, the constitutional question was timely raised since the petition for rehearing presented the first opportunity to raise that issue.

Id. at 444. The present case qualifies under this rule. The lower court did not interpret § 11-27-15, discuss, or in any way base its decision on the provisions of that statute. The lower court rested its decision on the Public Service Commission's lack of jurisdiction over the proposed interstate line. It was not until the Mississippi Supreme Court interpreted and applied § 11-27-15 that it first became possible to attack that statute as unconstitutional.

In addition, this Court has also considered an issue timely raised if, although first introduced in the petition for rehearing, the state court actually decided against the constitutional claim. Great Northern R. Co., 287 U.S. at 366. It is clear that it is not necessary that the state court decision expressly mention or even refer to the constitutional issue. Chambers v. Mississippi, 410 U.S. 284, 290 (1973); Chicago, B & Q. R. Co. v. Chicago,

166 U.S. 226, 231 (1898). It is sufficient if the "necessary effect" of the decision is to deny the constitutional claim. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, a decision of a state court enforcing and applying a state statute which has been attacked as unconstitutional has the effect of necessarily affirming the validity of that statute, and therefore the decision would be reviewable. Fiske v. Kansas, 274 U.S. 380, 385 (1927). In this case, the Mississippi Supreme Court's decision to deny the petition for rehearing necessarily upheld the validity of § 11-27-15 against the Appellant's constitutional challenge, and, therefore, the constitutional issue involving the statute's effect on interstate commerce is properly before this Court.

Similarly, the due process issue was also raised in a timely manner. The Supreme Court of Mississippi in its

October 10, 1984 opinion introduced the due process question posed in this appeal. Just as the Special Court of Eminent Domain did not evaluate, reach or reject the merits of the Commission's ruling as to the "public necessity" or "public use," that lower court did not recognize the Commission's ruling as establishing prima facie evidence that the Commission's determination was correct and proper, Miss. Code § 77-1-41, and did not find that the Commission's order was not supported by substantial evidence or was contrary to the manifest weight of the evidence.

On appeal, however, the Supreme Court of Mississippi did evaluate the Commission's findings of "public necessity" and "public use" in the manner previously allowed only upon direct appeal from Commission rulings pursuant to Miss. Code § 77-3-67. Miss. Code § 77-3-67 was first construed in a manner that violated due process, by allowing subsequent,

collateral judicial challenges of Commission rulings after direct appeal or after the time for direct appeal has run, on October 10, 1984.

Appellant raised this question of due process at the first opportunity in its Petition for Rehearing and, therefore, the issue is properly before this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

MISSISSIPPI CODE § 11-27-15 IS UNCONSTITUTIONAL BECAUSE IT PLACES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

The Mississippi Supreme Court, in interpreting Miss. Code Ann. § 11-27-15 (1972), held that the terms "public necessity" and "public use" contained in that statute "contemplated use by the citizens of this state." (App. at 799) Since in its opinion the purpose of the proposed transmission line would be to transmit electricity out of state, the Court,

relying on the restrictive definitions of "public necessity" and "public use," refused to give MP&L the right to exercise eminent domain to acquire the right-of-way necessary to construct the power line. Without the power of eminent domain, MP&L is effectively foreclosed from proceeding further with the construction of the proposed transmission line.

As interpreted by the Supreme Court of Mississippi[1], § 11-27-15 clearly violates the United States Constitution by placing an impermissible burden on interstate commerce. The statute, in effect, provides that no utility company proposing to construct a transmission line to

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[1]See, Winters v. New York, 333 U.S. 507, 514 (1947) ("the construction of a state statute by the highest court of the state fixes its meaning for the purpose of determination of its constitutionality by the United States Supreme court as definitively as if it had been amended by the legislature").

transmit electricity out of the State of Mississippi will be allowed to exercise the power of eminent domain. Since the ability to exercise eminent domain is a prerequisite to constructing utility lines, § 11-27-15, by imposing this strict limitation on the use of eminent domain, effectively prohibits any utility from constructing a transmission line to be used primarily to transmit electricity outside this state. This result is clearly impermissible under the United States Constitution.

Initially, it is well settled that no state may prohibit a utility company from transmitting electricity out of state. This Court's decision in New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) makes this clear. In New England Power Co., this Court specifically disapproved a New Hampshire Public Utility Commission

order, entered pursuant to state statute, which had prohibited New England Power Company from exporting hydroelectric energy out of state. In so doing, the Court ruled that the Commission's order violated the commerce clause of the United States Constitution, stressing that the order was "precisely the sort of protectionist regulation that the commerce clause declares off limits to the state." Id. at 339. The Court stated that it could not be "disputed that the Commission's 'exportation ban' place[d] direct and substantial burdens on transactions in interstate commerce", and, therefore, the order was unconstitutional. Id. Arguably, § 11-27-15, by effectively restricting the transmission of electricity out of the state of Mississippi should similarly be invalidated because of

its prohibited burden on interstate commerce.[2]

Additionally, it is also clear that no state can indirectly impose an "exportation ban" by prohibiting the construction of facilities that are to be used to transmit energy out of state. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). This prohibition applies equally as well to a state's attempt to restrict the flow of energy out of state by limiting the right to exercise eminent domain. Id. In West v. Kansas Natural Gas Co., the United States Supreme Court struck down an Oklahoma statute which provided that no company proposing to transmit natural gas out of Oklahoma would be granted a corporate charter or allowed to

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[2]See Id. at 338 (noting that "absent federal legislation, it would be 'questionable' whether a state could constitutionally restrict interstate trade in hydroelectric power").

exercise the right of eminent domain. Id. The effect of the statute was to prohibit the construction of any gas pipeline which would be used to transmit gas out of the state of Oklahoma. The United States Supreme Court, in invalidating the statute, emphasized that "no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on." Id. at 262. This principle, although specifically applied in West to natural gas, should be equally applicable to the present attempt to limit the construction of transmission lines to transmit electricity out of Mississippi.[3]

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[3]See Arkansas Electric Cooperative Co. v. Arkansas Public Commission, 103 S.Ct. 1095 (1983) ("the production and transmission of electricity is an activity particularly likely to affect more than one state and the effect on interstate commerce is often significant enough that uncontrolled regulation by the states can

(Footnote continued)

The Court in West also specifically cited with approval the Indiana Supreme Court decision in State ex rel. Corwin v. Indiana & O. Oil, Gas & Mineral Co., 120 Ind. 575, 22 N.E. 778 (1889). 221 U.S. at 256. The Court's discussion of the Indiana decision is particularly applicable to the present case. The Court stated that the Indiana statute had

> made it unlawful to pipe or conduct gas from any point within the state to any point or place without the state. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended on the other hand, as a provision for the exercise of eminent domain, confining it to those engaged in state business, denying it to those engaged in interstate business; and, further, as imposing restrictions on foreign corporations. . . . The [Indiana] court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose "plainly and unmistakeably

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(Footnote continued)
patently interfere with broader national interests").

> manifested" to prohibit transportation of natural gas beyond the limits of the state; and that, this being its purpose, it was void as a regulation of interstate commerce.

221 U.S. at 256. (Emphasis added).

The reasoning of the Indiana court, specifically endorsed by this Court, is similarly persuasive here. As in Corwin, the State of Mississippi has attempted to limit the right to exercise eminent domain to those utility companies transmitting electricity to points within this state. This Court's apparent disapproval of the Indiana statute should extend to the Mississippi statute in this case.

These cases clearly demonstrate why § 11-27-15 should be declared invalid. In determining the constitutionality of a statute, this Court has consistently held that a statute should be judged by its effect and operation. Near v. Minnesota Ex rel. Olson, 283 U.S. 697, 708 (1931); Standard Oil Co. v. Graves, 249 U.S. 389, 394 (1919). When viewed in this light, it

is readily apparent that § 11-27-15 cannot withstand a constitutional challenge. It is clear that the actual effect of the statute is to prohibit the construction of any transmission line which will be used primarily to transmit electricity out of this state. The statute, in addition, also operates to effectively restrict the transmission of electricity to states outside Mississippi. Previous decisions of this court involving similar efforts by other states to control the flow of energy out of those states clearly indicates the impermissibility of such attempts. See, New England Power Co. v. New Hampshire, 455 U.S. 331; West v. Kansas Natural Gas, 221 U.S. 229.[4] The State of Mississippi, by using § 11-27-15 to seriously restrict

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[4]See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981) ("as the court stated in West v. Kansas, 'in matters of foreign and interstate commerce, there are no state lines'").

a utility company's ability to exercise eminent domain, has attempted to accomplish by indirect means what has otherwise been held to be constitutionally forbidden. This Court should block this effort to circumvent established constitutional principles and rule that ¶ 11-27-15 is constitutionally invalid because of its impermissible effect on interstate commerce.

The constitutional question involved in this case is a substantial one. As this Court noted in FERC v. Mississippi, 456 U.S. 742, 757 (1982), "it is difficult to conceive of a more basic element of interstate commerce than electric energy." This Court's decision on the issue of whether the State of Mississippi can constitutionally restrict or prohibit the transmission of electricity outside the state could significantly affect the ability of other states to similarly

restrict the flow of energy beyond their own borders.

II.

MISSISSIPPI CODE § 11-27-15 IS UNCONSTITUTIONAL BECAUSE IT ALLOWS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Pursuant to Miss. Code § 77-3-11, Appellant applied to the Commission for a certificate of public convenience and necessity for the fifty-one mile transmission line in question. Under § 77-3-47, the Commission was required, among other things, to provide specified notice of any hearing on an application for such a certificate, including notice by publication in a newspaper of general circulation published in Jackson, the state capitol. It is admitted that these notice requirements were followed.

Section 77-3-47 prescribes the manner of hearing and the rights of various persons to be heard. Under § 77-3-67, appeals

from the Commission could be taken only to the chancery court of the judicial district in which the utility's principal place of business is located -- here, Hinds County. Finally, that section provides that Commission orders may not be vacated except for errors of law, or when not supported by substantial evidence, when contrary to the manifest weight of the evidence, when in excess of statutory authority or jurisdiction of the Commission or when in violation of constitutional rights.

Prior to the Supreme Court of Mississippi's opinion on October 10, 1984, there was no state law provision allowing plenary consideration of a Commission ruling, other than by direct appeal under § 77-3-67. In its October 10 ruling, however, the Court construed Miss. Code §§ 11-27-15 as providing such additional appellate review of a Commission ruling in a separate proceeding. So interpreted, § 11-27-15 violates

Appellant's Fourteenth Amendment right to due process of law.

The constitutional problems posed by this new statutory collateral attack are amply demonstrated by the facts of the present case. Appellant applied to the Commission for the required certificate. The Commission served the prescribed notice, including statewide publication in a Jackson newspaper. The Commission held hearings, Appellant presented evidence, and the Commission issued the certificate of public convenience and necessity that was a prerequisite to Appellant's constructing any high voltage transmission line. There was no appeal of the Commission's ruling.

Appellant began purchasing the right-of-way for, and began construction of this fifty-one mile transmission line. When Appellant could not agree upon a right-of-way purchase price with a first group of landowners, Appellant instituted an

eminent domain proceeding, based upon the Commission's October 20, 1981 order (App. at 1a-15a), in the Special Court of Eminent Domain of Walthall County, Judge Joe N. Pigott presiding. That court reached a verdict, and on August 19, 1983, Judge Pigott entered judgment, setting the price to Appellant for the right-of-way for those landowners at $55,880.50. (App. at 16a-22a)

Appellant continued purchasing the right-of-way and constructing the transmission line, all according to the Commission's order of October 20, 1981, until Appellant could not reach agreement on an easement price with the Appellees. Appellant instituted a second eminent domain proceeding, again based upon the Commission's certificate and again before Judge Pigott of the Special Court. This time, however, the Special Court ruled that the Commission did not have jurisdiction to issue the certificate, and

dismissed this second proceeding as based on a invalid certificate.

The Supreme Court of Mississippi affirmed that ruling but went further. The Court construed § 11-27-15 as precluding any order of the Commission from ever being final as to anyone who has standing to challenge that order. In reliance upon an unchallenged and presumptively final ruling of the statutorily designated administrative body, an electric utility spends millions of dollars, or tens of millions of dollars, in purchasing the right-of-way for and constructing a high voltage transmission line. But § 11-27-15 now allows any person in the proposed right-of-way path, at any stage of the construction of the line, to render those millions of dollars of expenditures worthless. Section 11-27-15 authorizes the taking of property without due process of law and violates Appellant's Fourteenth Amendment rights. Hughes v. Washington,

389 U.S. 290, 294 (1967) (Stewart, J., concurring).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSISSIPPI

U-4093	IN RE:	APPLICATION OF MISSISSIPPI POWER & LIGHT COMPANY, A CORPORATION ("APPLICANT"), FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, OPERATE, AND MAINTAIN APPROXIMATELY FIFTY-ONE (51) MILES OF 500 KV TRANSMISSION LINE FROM APPLICANT'S FRANKLIN EHV SUBSTATION IN FRANKLIN COUNTY THROUGH PORTIONS OF LINCOLN AND PIKE COUNTIES TO A POINT IN SECTION 35, TOWNSHIP 1 NORTH, RANGE 11 EAST, WALTHALL COUNTY ON THE MISSISSIPPI-LOUISIANA STATE LINE, TOGETHER WITH OTHER NECESSARY RELATED EQUIPMENT ALL WITHIN FRANKLIN, LINCOLN, PIKE, AND WALTHALL COUNTIES, MISSISSIPPI
MISSISSIPPI POWER & LIGHT COMPANY ELECTRIC BUILDING JACKSON, MISSISSIPPI		

October 20, 1981

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This cause coming on to be heard on the 13th day of October, 1981, at 10:00 o'clock a.m. in the offices of the Mississippi Public Service Commission on the Nineteenth Floor of the Sillers State Office Building, Jackson, Mississippi, on the Application of Mississippi Power & Light Company, hereinafter sometimes referred to as "Applicant," a corporation organized and existing under and by virtue of the laws of the State of Mississippi, for a Certificate that the present and future public convenience and necessity require, or will require, the construction, operation, and maintenance of certain electric facilities and equipment more particularly described in the Application filed in this cause, and hereinafter in this Order, all of which will be for the transmission and distribution of electricity for intrastate sale or sales

to and for the public for compensation; and

Applicant introduced evidence, both oral and documentary, in support of its Application, and the Commission having heard and considered the matter, and being fully advised in the premises, finds as follows, to-wit:

That the Application was filed with the Commission on September 14, 1981, by Applicant, and that said cause was returnable for hearing to the October docket call of the Commission to be held on October 6, 1981, and notice of said hearing was given to all persons interested therein by publication in The Clarion-Ledger on September 16, 1981, a newspaper of general circulation published in Jackson, Mississippi, and by mailing such notice by registered or certified mail to each public utility or person interested therein who may be affected by an Order resulting from said Application and a

hearing, said notices having been mailed as is required by law at least twenty (20) days prior to the hearing hereof, and having been in strict compliance with the law and having been in the judgment of the Commission such reasonable notice of said hearing to all interested persons as is necessary under the law and under the rules and regulations of the Commission; and

That on October 6, 1981, the date of the October docket call of the Commission, the Commission continued this matter and set it for hearing on October 13, 1981. Notice of said setting and hearing date was given to all interested persons as is necessary and as required under the law and under the rules and regulations of the Commission; and

That the Commission has jurisdiction of the parties and of the subject matter, and jurisdiction to do that hereunder done in manner and form as done; and

That no objections or protests to the granting of a Certificate to the Appellant herein have been filed, and that no protestants appeared at the hearing on said cause, and no objections have been made to the granting of this Order; and

That Applicant is a utility as defined in Section 1 D (1) of the Public Utilities Act of 1956, Chapter 372, Mississippi Laws of 1956, 12 amended (Section 77-3-1, et seq., Mississippi Code of 1972) (the "Act"). That as such the construction and operation of Applicant's facilities and extensions thereof fall under the purview of the Act. That a true and correct copy of Applicant's Restated Articles of Incorporation and amendments thereto are on file with the Commission in Cause U-3850, and a true and correct copy of the Articles of Merger whereunder Applicant succeeded to the rights, privileges, and properties of Mississippi Power & Light Company, a Florida corporation, is on file

with this Commission in Cause U-778, and both are hereby incorporated in the Application in this cause by reference.

That Applicant is and with its predecessor companies has for many years been engaged in its business as an electric public utility within Franklin, Lincoln, Pike, and Walthall Counties, Mississippi, where it maintains, and has for many years maintained, transmission lines, transformer stations, distribution lines, and other facilities and equipment used and useful in its business as an electric public utility. That on December 3, 1958, and November 25, 1959, this Commission granted unto Applicant's predecessor company in Cause U-44 Certificates of Public Convenience and Necessity to continue its facilities and operations substantially as applied for in said cause and indicated on the exhibits attached thereto, including the counties aforesaid, which Orders were made permanent by an Order of the

Commission in Docket U-44 dated September 3, 1968, as amended by an Order dated October 1, 1968, all of which Orders are incorporated in the Application in this cause by reference.

That Applicant proposes to construct approximately fifty-one (51) miles of single circuit, steel tower, 500 KV transmission line from Applicant's Franklin EHV substation located in Section 6, Township 6 North, Range 6 East, Franklin County, through portions of Lincoln and Pike Counties to a point in Section 35, Township 1 North, Range 11 East, Walthall County, on the Mississippi-Louisiana state line. That the line will be constructed with triple bundle 954 MCM ACSR conductors and with two shield wires. That there is attached to the Applicant in this cause and marked Exhibits "A" through "D" maps of Franklin, Lincoln, Pike, and Walthall Counties, showing thereon Applicant's existing facilities, certificated service

areas, and the location of the proposed transmission line. That as shown thereon, portions of the proposed transmission will be constructed within areas which are not certificated to Applicant, but that Applicant does not seek any additions to its service areas by virtue of this Application and construction and operation of the proposed transmission line. That Applicant proposes to construct such other necessary related equipment as may be necessary for the construction and operation of the aforesaid transmission line.

That the proposed new 500 KV transmission line will be a part of an interconnection with Louisiana Power & Light Company which will result in a 500 KV transmission line from Applicant's Franklin EHV substation to a point near Bogalusa, Louisiana. That the proposed transmission line will provide a source for a 500/230 KV substation to be built by Louisiana Power & Light Company near

Bogalusa, Louisiana. That this 500/230 KV substation will provide a firm source of power to the southern portion of Applicant's certificated service area, unload the Franklin EHV substation transformers in Franklin County, and further unload the 115 KV transmission lines from Applicant's Franklin EHV substation. That the construction of the proposed new 500 KV transmission line by Applicant will solve certain overloading and low-voltage problems associated with contingencies in the southern part of Applicant's service area (such as the loss of Franklin EHV substation transformers or loss of Applicant's Brookhaven-McComb 115 KV transmission line.) That the proposed Bogalusa 500/230 KV substation will eliminate the need for Applicant to increase the transformer capacity at its Franklin EHV substation and the need by Applicant to build additional 115 KV transmission lines from

its Franklin EHV substation to McComb, Mississippi, by the late 1980s.

That the proposed new 500 KV transmission line will ultimately be extended by Louisiana Power & Light Company to the eastern part of New Orleans. That this will increase the power transfer capability between Applicant and south Louisiana and provide increased reliability to Applicant's Franklin EHV substation.

That Applicant's present estimate indicates that the cost of the proposed transmission line will be $25,400,000.00. That construction of the project will begin immediately and present estimates indicate that the line is expected to be completed in 1985.

That there is presently on file with the Commission a financial statement of Applicant which indicates that it is financially able at the present time to undertake the aforesaid construction.

That Applicant will secure funds for said construction from cash generated through operation and from the sale of notes and/or other securities of Applicant as may be appropriate in the light of Applicant's position and the then current market conditions.

Certain locations as shown on the exhibits to the Application in this cause for the construction of the facilities requested herein are approximate, and the actual location of said transmission line will depend upon the ground surveys and right-of-way acquisitions in the future, considering terrain, accessibility, and the nature of the area. This project is hereby approved, together with the necessary right-of-way and land acquisition, with the exact location of the same to be determined as above stated.

Likewise, the estimates of the project cost and completion date are present estimates based on available information

and are subject to change due to unforeseeable circumstances. This project is hereby approved and a certificate granted with exact cost and completion date being subject to change as above stated.

Applicant is not, by virtue of the aforesaid construction and this Order, granted any additions to its service area and does not, by reason of this proposed construction, acquire the right to serve any consumers that it would not otherwise be entitled to serve.

The only other suppliers of electric energy operating within the various areas which are the subject of the Application in this cause, or which might have an interest in the outcome of said Application, are Magnolia Electric Power Association, McComb, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association,

Columbia, Mississippi; and South Mississippi Electric Power Association, Hattiesburg, Mississippi.

Applicant is ready, willing, and able to conduct the construction applied for herein and to operate the same and to render adequate electric service to all persons and premises which it is legally entitled to serve. All of the facilities requested in the Application in this cause will be constructed in accordance with the National Electric Safety Code and good practices in the electric utility industry.

The present and future public convenience and necessity require, and will require, that Applicant be granted by the Commission a Certificate of Public Convenience and Necessity to acquire, extend, construct, operate, and maintain the facilities hereinabove described and applied for, together with the rights-of-way necessary and incidental thereto.

IT IS, THEREFORE, CONSIDERED BY THE COMMISSION, ORDERED, AND ADJUDGED on the hearing of said Application and all matters therein requested, that this Commission should, and by these presents, does hereby grant unto Mississippi Power & Light Company, a Mississippi corporation, the Applicant herein, its successors and assigns, a Certificate that the present and future public convenience and necessity require and will require that the Applicant acquire the necessary property, easements, and rights-of-way, and extend, acquire, construct, operate, and maintain the electric facilities herein particularly described and hereby applied for in its Application filed in this cause on September 14, 1981, and to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation, as the same are fully described and applied for

in the Application and record of this cause and as fully described herein.

This Order shall be effective from and after the date of issuance.

The Commission retains jurisdiction of this matter for all purposes authorized by law.

ORDERED AND ADJUDGED on this, the 20th day of October, 1981.

/s/ E. W. Robinson

E. W. ROBINSON,
EXECUTIVE SECRETARY

cc: List on File

(SEAL)

APPENDIX B

IN THE CIRCUIT COURT OF
WALTHALL COUNTY, MISSISSIPPI

SPECIAL COURT OF EMINENT DOMAIN

Civil Action No. 3823

Mississippi Power & Light Company

Petitioner

v.

Jewell D. Thomas and Francis W. Thomas

Defendants

August 19, 1983

J U D G M E N T

In this civil action the claim of Petitioner, Mississippi Power & Light Company, a public corporation organized and existing under the laws of the State of Mississippi, to have condemned certain real property named in the Petition for Condemnation hereafter described, the fee simple title to said property being vested in Jewell D. Thomas and Francis W. Thomas, was submitted to a jury composed of Mrs.

Dan Alford, Janice Carson Butler, Cecile Davis, Douglas Dillon, Marcus Green, Odessa Magee Hopkins, Alton Magee, Juanita Magee, Elijah Ratliff, Jr., Kim Roberts, Rosemary Rushing and Gene Autry Smith, on the 17th day of August, 1983, and the jury returned a verdict in favor of Defendants Jewell D. Thomas and Francis W. Thomas, fixing said Defendants' due compensation in damages at Fifty-five Thousand Eight Hundred Eighty and 50/100 ($55,880.50) Dollars, and the verdict was received and filed.

Now, upon the payment of said award with legal interest from the date of the filing of the Petition for Condemnation, being June 8, 1983, by Mississippi Power & Light Company to said Defendants, or to the Circuit Clerk of Walthall County, Mississippi, for their use and benefit as provided by law and as herein ordered, Petitioner can enter upon and take possession of the hereinafter described

property and appropriate it to public use as prayed for in its Petition, which public use is hereinafter set forth, said lands being all situated in Walthall County, Mississippi, and being particularly described as follows, to-wit:

> Commencing at the Northwest corner of the E 1/2 of SE 1/4 of the SW 1/4 of Section 27, Township 1 North, Range 11 East, Walthall County, Mississippi; run thence South 8.4 feet to a point on the Jewell D. Thomas west property line and Point of Beginning of the right-of-way herein described; from said Point of Beginning run thence south a distance of 129.0 feet to a point on the centerline of Mississippi Power & Light Company's Franklin-Bogalusa 500 KV transmission line, thence continue south 129.0 feet to a point on the south right-of-way line of said transmission line, thence run South 51°36'13" East a distance of 7639.0 feet to a point on the Jewell D. Thomas east property line (said point being 1,515.6 feet, more or less, north of the southeast corner of the SE1/4 of the SW1/4 of Section 35, Township 1 North, Range 11 East, Walthall County, Mississippi); thence run north along the said east property line fence a distance of 129.0 feet to a point on the centerline of said Mississippi Power & Light Company electric transmission line, thence continue north 129.0 feet to the north right-of-way line of said transmission line, thence run North 51°36'13" West along said north right-

of-way line a distance of 7639.0 feet to the Point of Beginning located on the Jewell D. Thomas west property line; containing 35.07 acres, more or less, less and except any part of the above described area lying within the limits of existing county road right-of-way.

The use and purpose for which the property above described is taken is for a right-of-way and easement with all the privileges and rights of enjoyment and use thereof accorded and given under the laws of the State of Mississippi, including the following rights and subject to the following limitations:

For the location, construction, reconstruction, operation, maintenance and removal of an electric circuit or circuits, including towers, poles, crossarms, insulators, wires, hardware, switches and all other equipment, structures, material and appliances now or hereafter used, useful or desired in connection therewith, over, across, under and on that land herein described. Included in this

right-of-way and easement, Petition shall have the full right, without payment of further compensation, of ingress and egress across Defendants' property to said right-of-way, to clear and keep clear said right-of-way, including the right to cut down, burn, condition, treat or otherwise, remove all trees, timber, undergrowth and other obstructions. Petitioner shall have the full right, without payment of further compensation, to cut down all trees that are tall enough to strike the wires when falling, where located beyond the limits of the said right-of-way, such trees being known as "danger trees." Petitioner shall have the further right to cut down, from time to time, danger trees located beyond the limits of the said right-of-way, provided Petitioner shall pay Jewell D. Thomas and Francis W. Thomas, or their successors in title, the reasonable market value of such trees at the time of cutting, but only when such cutting occurs after

the initial construction as above set forth. In addition thereto, Jewell D. Thomas and Francis W. Thomas, or their successors in title, shall have the right to use the land in question for agricultural or other purposes as long as said purposes do not interfere with the rights herein created in Petitioner, and Petitioner retains the right to clear, cut down or destroy any crops on said Petitioner's right-of-way, if necessary, but Petitioner will pay to Jewell D. Thomas and Francis W. Thomas, or their successors in title, the reasonable market value of said agricultural crop at the time of the said clearing or cutting, but only when such clearing or cutting occurs after the initial construction, as above set forth.

Petitioner also requires such title that there will not be constructed, or permitted to be constructed, any house, barn, well, lake or other structure or hazard on said right-of-way.

Jewell D. Thomas and Francis W. Thomas, or their successors in title, shall have, at all times, the right to use the said right-of-way for any lawful purposes, provided it does not interfere with the rights herein created in Petitioner, and Petitioner will not enclose said right-of-way.

A certified copy of this judgment shall be filed, recorded and indexed, in the same manner as a land deed, upon the land records on file in the office of the Chancery Clerk of Walthall County, Mississippi.

Let the Petitioner pay the costs, for which execution may issue.

ORDERED AND ADJUDGED, on this the 19th day of August, 1983.

/s/ Joe N. Pigott
CIRCUIT JUDGE

APPENDIX C

IN THE SPECIAL COURT OF EMINENT DOMAIN OF

WALTHALL COUNTY, MISSISSIPPI

Civil Action No. 3844
Civil Action No. 3843
Civil Action No. 3845
Civil Action No. 3846

Mississippi Power & Light Company

v.

Louis A. Conerly, et al

February 3, 1984

ORDER ON MOTIONS TO DISMISS

These causes having been consolidated for hearing of Motions filed by the Landowners and came on for hearing on Motions to Dismiss the Eminent Domain Proceedings brought by Mississippi Power & Light Co. (M.P.& L.Co.) for the taking of a right of way across lands of the Moveants for the construction of a 500 KV electric transmission line from Petitioner's Franklin

EHV Sub-station in Franklin County, Mississippi, to the Louisiana state line to there connect with Louisiana Power & Light Co.

It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV Sub-station to Louisiana Power & Light Co. It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.

The Court must first determine whether it has jurisdiction and authority to conduct eminent domain proceedings (Section 11-27-15 Code of 1972). Petitioner is proceeding under Section 11-27-47 which provides in part that such companies "are hereby empowered to exercise the right of eminent domain in the manner now provided by law." Section 17 of the Mississippi

Constitution of 1890 provides in part that "the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public" . . .

Section 77-3-14 of Code of 1972 provides that a certificate of public convenience and necessity is required before beginning construction of any facility for the generation and transmission of electricity to be directly or indirectly used for the furnishing of public utility service in this state. In Miss. Power & Light Co. vs. Blake, 236 Miss. 207, 109 So.2d 657-661 it was held that public utilities are required to obtain a Certificate of Public Convenience and Necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of the right of eminent domain.

> Section 77-3-67 provides that The order shall not be vacated or set aside either in whole or part, except for errors of law, unless the court finds that the order of the Commission is not supported by substantial evidence, is contrary to the manifest weight of evidence, is in excess of the statutory authority or jurisdiction of the Commission, or violated constitutional rights.

In the legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission Section 77-3-5 Code of 1972 provides "Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. . ."

The primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to the Louisiana Power & Light Co. in the State of Louisiana near Bogalusa, Louisiana, ultimately to be extended by Louisiana Power & Light to the eastern

part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electric power transmitted by the line will not be within the jurisdiction of the Mississippi Public Service Commission but will be fixed by the Federal Energy Regulatory Commission.

The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale. (see Texas Gas Transmission Corp. vs. Miss. Public Service Comm. 133 So.2d 526 (1961) and United Gas Pipeline Corp. vs. Mississippi Public Service Commission 133 So.2d 521 (1961).

In the case at bar it is not a question as to the desireability, feasibility or practicallity of the electric power

line; but whether or not under the law Mississippi Power & Light Co. have the right to take from the landowners their land or rights of way for the use of Mississippi Power & Light Co. and Louisiana Power & Light Co. The sale of electric power by M.P.&.L Co. to La P.& L.Co. may indirectly cause an economic benefit to the customers of Mississippi Power & Light Co; but the sale is an interstate sale; the construction of the line is solely for interstate for business. The granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Section 17 of the Mississippi Constitution.

It is therefore ordered and adjudged that the Motions to Dismiss the Petitions for Eminent Domain should be and are hereby sustained and the Petitions are

hereby dismissed at the costs of the Petitioner.

ORDERED AND ADJUDGED this the 3rd day of February, 1984.

/s/ Joe N. Pigott
CIRCUIT JUDGE AND JUDGE OF
THE SPECIAL COURT OF
EMINENT DOMAIN

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

October 10, 1984

Before BOWLING, HAWKINS AND SULLIVAN

BOWLING, JUSTICE, FOR THE COURT:

This appeal involves proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, Circuit Judge Joe N.

Pigott presiding, according to applicable eminent domain statutes. Appellant, Mississippi Power & Light Company (MP&L) appeals from an order of the circuit judge dismissing its petitions for condemnation of land attempted to be secured for construction of a high voltage electric transmission line. The appeal brings four consolidated condemnation suits and involves four separate pieces of property owned by appellees. The principle issue is whether or not the trial judge had sufficient basis to dismiss the condemnation petitions. We hold that he did and we affirm his orders.

In 1981 appellant MP&L decided to construct a 500 kilovolt (Kv) transmission line from its substation in Franklin County, Mississippi, known as the "Franklin Substation" to a point on the Mississippi-Louisiana line. The Louisiana Power & Light Company (LP&L) was then to continue the high voltage line to

Bogalusa, Louisiana and eventually to the Eastern New Orleans electrical distribution point solely owned and operated by LP&L. Already constructed is a 500 Kv line from the new Grand Gulf nuclear energy plant in Mississippi to the Franklin Substation. The proposed new line of fifty-one miles from that station to the Louisiana line would continue the high power line so that it would carry electricity from the Grand Gulf plant into Bogalusa and from there, eventually, to New Orleans.

Prior to the attempt to secure the right of way for the fifty-one mile high voltage line, MP&L applied for a certificate of public convenience and necessity from the Mississippi Public Service Commission (MPSC), as required by the provisions of Mississippi Code Annotated, Section 77-3-14, which reads as follows:

> (1) Notwithstanding the provisions of section 77-3-11 and section 77-3-13, no public utility or other

person shall begin the construction of any facility for the generation and transmission of electricity to be directly or indirectly used for the furnishing of public utility service in this state, even though the facility be for furnishing the service already being rendered, without first obtaining from the commission a certificate that the public convenience and necessity requires, or will require, such construction.

(2) The commission shall develop, publicize and keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in Mississippi, including its estimate of the probable future growth of the use of electricity, the probable needed generation reserves, the extent, size, mix and general location of generating plants and arrangements for pooling power to the extent not regulated by the federal energy regulatory commission and other arrangements with other utilities and energy suppliers to achieve maximum efficiencies for the benefit of the people of Mississippi, and shall consider such analysis in acting upon any petition by any utility for construction. Each public utility engaged in the generation, transmission and distribution of electric energy shall, upon request of the commission, submit to the commission its forecasts and plans for the addition of generating capacity planned by the utility for an ensuing five-year period and shall furnish to the commission such documents and proof with respect to the need therefor as the commission may reasonably require.

In considering these analyses and forecasts, the commission shall consult with the board of economic development, the research and development center, the utilities commissions or comparable agencies of neighboring states, the federal energy regulatory commission and other agencies having relevant information and/or duties and responsibilities in this area, and particularly with the Mississippi Energy and Transportation Board with reference to the accomplishment of the Mississippi energy and transportation plan provided for in section 57-39-11.

(3) In acting upon any petition for the construction of any facility for the generation of electricity, the commission shall take into account the utility's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods of providing reliable, efficient and economical electric service.

(4) As a condition for receiving such certificate, the utility shall file an estimate of construction costs in such detail as the commission may require. The commission shall hold a public hearing on each application, and no certificate shall be granted unless the commission has approved the estimated construction costs.

(5) The commission shall maintain an ongoing review of such construction as it proceeds, and the applicant shall submit at such times

> as the commission shall require during construction a progress report and any revisions in the cost estimates for the construction.

On October 20, 1981, the MPSC issued its "Order Granting Certificate of Public Convenience and Necessity." Pursuant to this permission, appellant MP&L proceeded to acquire the right-of-way for the fifty-one mile high voltage line. Under this procedure, set up by the legislature, everything would have gone smoothly had all affected landowners and MP&L agreed on the sale and purchase of the right-of-way. This effort, however, was interfered with when the four sets of property owners involved in this appeal would not agree on a purchase and sale of their property for the electrical power line.

The next step in the cause was the filing by appellant MP&L of four petitions for condemnation in the Special Court of Eminent Domain, under the provisions of MCA § 11-27-2, et seq. (1972). The

particular section granting MP&L authority to file the condemnation proceedings is MCA § 11-27-47, which gives eminent domain rights to all companies

> . . . organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain. . . .

The condemnation petitions all had attached thereto as an exhibit, and made a part of the petition, the hereinbefore mentioned order of the MPSC.

The appellees filed their motions to dismiss the condemnation proceedings under the provisions of MCA § 11-27-15, which provides in part as follows:

> Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and

> in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the petition.

In addition to the above set out statutory grounds for dismissal of the condemnation petitions, appellees contended that the real purpose for the construction of the high voltage line was for interconnection of the corporate utility entities owned solely by Middle South Utility System. These entities are MP&L, LP&L, Arkansas Power & Light (AP&L) and New Orleans Public Service, Inc. (NOPSI). Appellees alleged that this proposed construction was not an intrastate operation subject to

being under the jurisdiction of the MPSC. The petitions for dismissal contended that the scheme for constructing the high voltage line was to carry electricity interstate from Grand Gulf Generating Plant to LP&L facilities. Appellees contend that the allegation by appellant of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line. Appellees contend that the line was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi. Contention is made by appellees that the purpose of the line is "interstate" rather than "intrastate", as was stated in the MPSC order attached and made a part of the condemnation proceedings.

After an evidentiary hearing consisting of testimony from the director of engineering office of appellant, interrogatories and answers thereto,

requests for admissions, stipulations and documents, such as corporate minutes, the circuit judge heading the Special Eminent Domain Court dismissed all four condemnation proceedings and the condemnor MP&L appeals here as a preference case.

The order dismissing appellant's petitions recites what we hereinafter shall discuss as material findings of fact. Unlike other judicial proceedings, the Special Court of Eminent Domain results in the circuit judge [in counties where there is no county court] being the finder of facts in determining whether or not the condemnation petitions should be dismissed under the hereinbefore quoted MCA § 11-27-15 (1972).

The lower court's order in its finding of facts on material issues, found:

> It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV sub-station to Louisiana Power & Light Co. It is admitted

that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.

Petitioner is proceeding under MCA § 11-27-47 (1972), which provides, in part, that such companies are hereby empowered to exercise the right of eminent domain. Mississippi Constitution, Article 3, Section 17 (1890) provides in part that: "The question whether the contemplated use be public shall be a judicial question and as such, determined without regard to legislative assertions that the use it public...." The legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission, Section 77-3-5 Code of 1972, provides:

> Subject to the limitation imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities.

The primary stated purpose of the proposed 500 Kv line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light Company in the State of Louisiana, near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electrical power transmitted by the line will not be within

> the jurisdiction of the Mississippi Public Service Commission, but will be fixed by the Federal Energy Regulatory Commission.

The order further states:

> The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale.

Appellant contends that the judicially composed Special Eminent Domain Court was obligated to follow the MPSC's order authorizing the construction of the "intrastate line." Appellant further contends that under the applicable statute, MCA § 77-3-67 (1972), appellees were barred from securing a dismissal of the condemnation proceedings as they did not within thirty days of the MPSC's original order, appeal that order to the Chancery Court of Hinds County. The disposal of this argument is easy. MCA § 77-3-47 (1972), providing for notice of the commission's hearing such matters as that

requested by appellant states that "notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi." Admittedly, appellee landowners in Walthall County received no notice of the "hearing" before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279

(1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956).

The first notice received by appellees was the summons from the Special Court of Eminent Domain brought about by appellant filing its petitions for condemnation.

Before going further, we need to note the provisions of Mississippi Constitution, Article 3, Section 17 (1890), as follows:

> Private property shall not be taken or damages for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

Obviously, in obedience to the above quoted constitutional provision, the legislature in 1971 enacted the hereinbefore set out MCA § 11-27-15 (1972), which affirmatively gave the

Special Court of Eminent Domain the power to dismiss the condemnation petitions for certain reasons, particularly, if the court found that there was "no public necessity" for the taking or that the "use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The MPSC is an arm of the legislature and understandably and properly oversees the actions of the utility companies in order to safeguard the rights of the people of this State. It certainly is commendable to require that the MPSC give its permission to the utility company before the latter proceeds to build its lines. The MPSC however only has jurisdiction within the State of Mississippi in such matters, and consequently, has the duty to control and regulate "intrastate" utility activities. The ballgame was switched to a different field when appellant filed its condemnation proceedings in the judicial

Special Eminent Domain Court. Even though appellant in its request is relying on the previous MPSC order, appellant admits that it is a prerogative of the eminent domain court judge to evaluate facts in deciding whether he should legally dismiss the condemnation proceedings.

As the proceedings have reached judicial proportions, there are certain elemental principles involved. Among them being, as said by this Court in Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910):

> "No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power to exercise the right of eminent domain." . . ."The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the landowner must have the benefit of that doubt."

This Court recently has held that it is a general rule of statutory construction that where there is doubt of the right to exercise the power of eminent domain, the statutes will be strictly construed most favorable to the land owner. Roberts v. Mississippi State Highway Commission, 309 So.3d 56 (1975); Barry v. Southern Pine Electrical Power Association, 22 Miss. 260, 76 So.2d 412 (1954); and Fergusson v. Board of Supervisors, 149 Miss. 623, 115 So. 779 (1928).

We need now to look at the facts before the fact finder, Judge Pigott, at the time he sustained appellee's motion to dismiss.

The origination of the high voltage line in Mississippi is shown in the minutes of the operating committee of Middle South Utilities System. Portions of these minutes are as follows:

> The recognition of the necessity of increasing the Middle South System transmission capacity between the

south and the north based on the System Planning Committee reports of September 3, 1980 and December 3, 1980, the Operating Committee unanimously adopted the Planning Committee recommendations which are listed as follows:

1. The proper northern termination of a 500 Kv line from the East Orleans Energy Center is the Franklin 500 Kv switchyard of MP&L. Further, the bus at Franklin should not be split.

2. A switching station with a 500/230 Kv autotransformer should be constructed at Bogalusa.

3. The generating units at the East Orleans Energy Center should be connected directly to the 230 Kv system rather than directly to the 500 Kv system.

The Operating Committee recognizes that in addition to providing the necessary capability, the major advantage of the eastern route is its geographic separation from the existing Middle South System south-north transmission. The proposed line minimizes the probability of simultaneous transmission outages caused by natural disasters. Additionally, this route will provide strengthening of the transmission system in the Bogalusa and southern MP&L areas.

Attached to the minutes is the following statement in regard to the line in question:

PURPOSE AND NECESSITY

Middle South System studies have shown the need for a 500 Kv line to the Eastern part of New Orleans. The Franklin EHV Substation was found to be the proper northern terminal of that line. This authorization is for the Miss. Power & Light Company portion of the Franklin - East New Orleans and southern MSU System and will be a part of the transmission needed to distribute power from the East Orleans Energy Center. This line will also provide a source for LP&L's 500/230 KV Substation planned at Bogalusa, LA. This 500/230 KV substation will provide a firm source of power to the South MP&L area, unload the Franklin transformers and the 115 KV transmission from the Franklin EHV Substation, and solves overloading and low voltage problems associated with contingencies in the southern part of MP&L's service area (such as loss of Franklin transformers or loss of Brookhaven-McComb 115 Kv line). The Bogalusa Substation will eliminate the need to increase the transformer capacity at Franklin and to build additional 115 KV transmission from Franklin to McComb by the late 1980's;

1.	Franklin to LA state line 500 Kv line	$23,650,000	1984
2.	Franklin Line Bay	1,750,000	1984
	TOTAL	$25,400,000	

The eminent domain court judge also had before him the testimony of Frank F.

Gallaher, Jr., chief engineer for Appellant, whose testimony briefly explained that the primary purpose of the line was to convey electricity interstate to Louisiana but that it would be "stepped-down" at Bogalusa, Louisiana, and in the event it is needed in the future, it would be re-routed and no doubt re-bought by MP&L through 115 Kv lines now in existence between the two stations and would thereby benefit the counties in appellant's Mississippi territory near Louisiana.

The MPSC by statute admittedly had the duty to protect the interests of the utility and the consumer by holding that the 51 mile high voltage line in question was intrastate business, even though not one Mississippi consumer will receive electricity directly from the line. The cost of the 51 mile line in the sum of approximately $25,000,000 would be borne by the rate payers of Mississippi. This money paid for the line would then be

added to the rate base at the utilities next rate increase request and therefore added to the bills sent Mississippi consumers.

The record does not reveal testimony of any sale agreement to MP&L by its sister company, Middle South Energy, Inc., the owner of Grand Gulf Generating Plant, both of whom are completely owned by Middle South Utilities, Inc. The record does show that by agreement appellant, MP&L, LP&L and NOPSI will buy Middle South Energy's portion of the capacity of energy from the Grand Gulf Plant. The record does not reveal any details regarding the sale by MP&L to LP&L when it does cross the Mississippi/Louisiana line on the 500 Kv line in question. There is no revelation as to the manner or the means of sale of electricity that might return to Mississippi from Louisiana through the Bogalusa substation. We are forced to conclude in this area, the lower court had

ample reason to find that any future benefit of the line in question to Mississippi resident rate payers is highly speculative and something that might possibly materialize in the future.

The eminent domain court judge held that the granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Mississippi Constitution Article 3, Section 17. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from Grand Gulf to Louisiana. The order of the MPSC stated that it was granting appellant's application "to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation."

We already have discussed and quoted pertinent parts of Judge Pigott's dismissal order. It should be remembered that appellant made the order of the MPSC a part of its condemnation petitions. We cannot disagree with Judge Pigott that this part of the condemnation proceedings wherein the MPSC granted its permission for "intrastate sales" was not a valid order.

Reiterating -- Judge Pigott was in the seldom occurring situation of being the finder of facts when those facts are disputed or contradictory. We find that under the facts before him, Judge Pigott had ample reasons to find as a fact that "no Mississippi customer would be served off the transmission line in question." And . . . "the primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light near Bogalusa, Louisiana, and ultimately

to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line."

The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA § 11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for "public use" and was not "in law a public use for which private property may be taken or damaged."

Even though Judge Pigott went further and held that MPSC erroneously labeled the line "interstate", the opinion still conforms to the requirements of § 11-27-15. We agree that MPSC was in error in making the line "intrastate" but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms "public necessity"

and "public use" as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizen rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base.

We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action.

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR.
PATTERSON, C.J., NOT PARTICIPATING.

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

December 12, 1984

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the

same is hereby Denied. The original opinion is modified.

APPENDIX F

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

December 12, 1984

Before BOWLING, HAWKINS AND SULLIVAN

BOWLING, JUSTICE, FOR THE COURT:

This appeal involves proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, Circuit Judge Joe N.

Pigott presiding, according to applicable eminent domain statutes. Appellant, Mississippi Power & Light Company (MP&L) appeals from an order of the circuit judge dismissing its petitions for condemnation of land attempted to be secured for construction of a high voltage electric transmission line. The appeal brings four consolidated condemnation suits and involves four separate pieces of property owned by appellees. The principle issue is whether or not the trial judge had sufficient basis to dismiss the condemnation petitions. We hold that he did and we affirm his orders.

In 1981 appellant MP&L decided to construct a 500 kilovolt (Kv) transmission line from its substation in Franklin County, Mississippi, known as the "Franklin Substation" to a point on the Mississippi-Louisiana line. The Louisiana Power & Light Company (LP&L) was then to continue the high voltage line to Bogalusa,

Louisiana and eventually to the Eastern New Orleans electrical distribution point solely owned and operated by LP&L. Already constructed is a 500 Kv line from the new Grand Gulf nuclear energy plant in Mississippi to the Franklin Substation. The proposed new line of fifty-one miles from that station to the Louisiana line would continue the high power line so that it would carry electricity from the Grand Gulf plant into Bogalusa and from there, eventually, to New Orleans.

Prior to the attempt to secure the right of way for the fifty-one mile high voltage line, MP&L applied for a certificate of public convenience and necessity from the Mississippi Public Service Commission (MPSC), as required by the provisions of Mississippi Code Annotated, Section 77-3-11, which reads as follows:

> (1) No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or

> electricity, or water, for any intrastate sale to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subparagraph (3) of paragraph (d) of section 77-3-3, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

On October 20, 1981, the MPSC issued its "Order Granting Certificate of Public Convenience and Necessity." Pursuant to this permission, appellant MP&L proceeded to acquire the right-of-way for the fifty-one mile high voltage line. Under this procedure, set up by the legislature, everything would have gone smoothly had all affected landowners and MP&L agreed on the sale and purchase of the right-of-way. This effort, however, was interfered with when the four sets of property owners involved in this appeal would not agree on a purchase and sale of their property for the electrical power line.

The next step in the cause was the filing by appellant MP&L of four petitions for condemnation in the Special Court of Eminent Domain, under the provisions of MCA § 11-27-2, et seq. (1972). The particular section granting MP&L authority to file the condemnation proceedings is MCA § 11-27-47, which gives eminent domain rights to all companies

> . . . organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain. . . .

The condemnation petitions all had attached thereto as an exhibit, and made a part of the petition, the hereinbefore mentioned order of the MPSC.

The appellees filed their motions to dismiss the condemnation proceedings under the provisions of MCA § 11-27-15, which provides in part as follows:

> Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the petition.

In addition to the above set out statutory grounds for dismissal of the condemnation petitions, appellees contended that the real purpose for the construction of the high voltage line was for interconnection of the corporate utility entities owned

solely by Middle South Utility System. These entities are MP&L, LP&L, Arkansas Power & Light (AP&L) and New Orleans Public Service, Inc. (NOPSI). Appellees alleged that this proposed construction was not an intrastate operation subject to being under the jurisdiction of the MPSC. The petitions for dismissal contended that the scheme for constructing the high voltage line was to carry electricity interstate from Grand Gulf Generating Plant to LP&L facilities. Appellees contend that the allegation by appellant of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line. Appellees contend that the line was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi. Contention is made by appellees that the purpose of the line is "interstate" rather than "intrastate", as was stated in the MPSC order attached and

made a part of the condemnation proceedings.

After an evidentiary hearing consisting of testimony from the director of engineering office of appellant, interrogatories and answers thereto, requests for admissions, stipulations and documents, such as corporate minutes, the circuit judge heading the Special Eminent Domain Court dismissed all four condemnation proceedings and the condemnor MP&L appeals here as a preference case.

The order dismissing appellant's petitions recites what we hereinafter shall discuss as material findings of fact. Unlike other judicial proceedings, the Special Court of Eminent Domain results in the circuit judge [in counties where there is no county court] being the finder of facts in determining whether or not the condemnation petitions should be dismissed under the hereinbefore quoted MCA § 11-27-15 (1972).

The lower court's order in its finding of facts on material issues, found:

> It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV sub-station to Louisiana Power & Light Co. It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.
>
> Petitioner is proceeding under MCA § 11-27-47 (1972), which provides, in part, that such companies are hereby empowered to exercise the right of eminent domain. Mississippi Constitution, Article 3, Section 17 (1890) provides in part that: "The question whether the contemplated use be public shall be a judicial question and as such, determined without regard to legislative assertions that the use it public...." The legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission, Section 77-3-5 Code of 1972, provides:
>
> > Subject to the limitation imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the <u>intrastate</u> business and <u>property</u> of public utilities.
>
> The primary stated purpose of the proposed 500 Kv line is to

> transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light Company in the State of Louisiana, near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electrical power transmitted by the line will not be within the jurisdiction of the Mississippi Public Service Commission, but will be fixed by the Federal Energy Regulatory Commission.

The order further states:

> The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale.

Appellant contends that the judicially composed Special Eminent Domain Court was obligated to follow the MPSC's order authorizing the construction of the "intrastate line." Appellant further contends that under the applicable statute, MCA § 77-3-67 (1972), appellees were barred from securing a dismissal of the condemnation proceedings as they did not

within thirty days of the MPSC's original order, appeal that order to the Chancery Court of Hinds County. The disposal of this argument is easy. MCA § 77-3-47 (1972), providing for notice of the commission's hearing such matters as that requested by appellant states that "notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi." Admittedly, appellee landowners in Walthall County received no notice of the "hearing" before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they

had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956).

The first notice received by appellees was the summons from the Special Court of Eminent Domain brought about by appellant filing its petitions for condemnation.

Before going further, we need to note the provisions of Mississippi Constitution, Article 3, Section 17 (1890), as follows:

> Private property shall not be taken or damages for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

Obviously, in obedience to the above quoted constitutional provision, the legislature in 1971 enacted the hereinbefore set out MCA § 11-27-15 (1972), which affirmatively gave the Special Court of Eminent Domain the power to dismiss the condemnation petitions for certain reasons, particularly, if the court found that there was "no public necessity" for the taking or that the "use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The MPSC is an arm of the legislature and understandably and properly oversees the actions of the utility companies in order to safeguard the rights of the people of this State. It certainly is commendable to require that the MPSC give its permission to the utility company before the latter proceeds to build its lines. The MPSC however only has jurisdiction within the State of Mississippi in such

matters, and consequently, has the duty to control and regulate "intrastate" utility activities. The ballgame was switched to a different field when appellant filed its condemnation proceedings in the judicial Special Eminent Domain Court. Even though appellant in its request is relying on the previous MPSC order, appellant admits that it is a prerogative of the eminent domain court judge to evaluate facts in deciding whether he should legally dismiss the condemnation proceedings.

As the proceedings have reached judicial proportions, there are certain elemental principles involved. Among them being, as said by this Court in Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910):

> "No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power to exercise the right of eminent domain." . . ."The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain

> provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the landowner must have the benefit of that doubt."

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We need now to look at the facts before the fact finder, Judge Pigott, at the time he sustained appellee's motion to dismiss.

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> The recognition of the necessity of increasing the Middle South System transmission capacity between the south and the north based on the System Planning Committee reports of September 3, 1980 and December 3, 1980, the Operating Committee unanimously adopted the Planning Committee recommendations which are listed as follows:
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> The Operating Committee recognizes that in addition to providing the necessary capability, the major advantage of the eastern route is its geographic separation from the existing Middle South System south-north transmission. The proposed line

minimizes the probability of simultaneous transmission outages caused by natural disasters. Additionally, this route will provide strengthening of the transmission system in the Bogalusa and southern MP&L areas.

Attached to the minutes is the following statement in regard to the line in question:

PURPOSE AND NECESSITY

Middle South System studies have shown the need for a 500 Kv line to the Eastern part of New Orleans. The Franklin EHV Substation was found to be the proper northern terminal of that line. This authorization is for the Miss. Power & Light Company portion of the Franklin - East New Orleans and southern MSU System and will be a part of the transmission needed to distribute power from the East Orleans Energy Center. This line will also provide a source for LP&L's 500/230 KV Substation planned at Bogalusa, LA. This 500/230 KV substation will provide a firm source of power to the South MP&L area, unload the Franklin transformers and the 115 KV transmission from the Franklin EHV Substation, and solves overloading and low voltage problems associated with contingencies in the southern part of MP&L's service area (such as loss of Franklin transformers or loss of Brookhaven-McComb 115 Kv line). The Bogalusa Substation will eliminate the need to increase the transformer capacity at Franklin and to build additional 115 KV

transmission from Franklin to McComb by the late 1980's;

1.	Franklin to LA state line 500 Kv line	$23,650,000	1984
2.	Franklin Line Bay	1,750,000	1984
	TOTAL	$25,400,000	

The eminent domain court judge also had before him the testimony of Frank F. Gallaher, Jr., chief engineer for Appellant, whose testimony briefly explained that the primary purpose of the line was to convey electricity interstate to Louisiana but that it would be "stepped-down" at Bogalusa, Louisiana, and in the event it is needed in the future, it would be re-routed and no doubt re-bought by MP&L through 115 Kv lines now in existence between the two stations and would thereby benefit the counties in appellant's Mississippi territory near Louisiana.

The MPSC by statute admittedly had the duty to protect the interests of the utility and the consumer by holding that the 51 mile high voltage line in question

was intrastate business, even though not one Mississippi consumer will receive electricity directly from the line. The cost of the 51 mile line in the sum of approximately $25,000,000 would be borne by the rate payers of Mississippi. This money paid for the line would then be added to the rate base at the utilities next rate increase request and therefore added to the bills sent Mississippi consumers.

The record does not reveal testimony of any sale agreement to MP&L by its sister company, Middle South Energy, Inc., the owner of Grand Gulf Generating Plant, both of whom are completely owned by Middle South Utilities, Inc. The record does show that by agreement appellant, MP&L, LP&L and NOPSI will buy Middle South Energy's portion of the capacity of energy from the Grand Gulf Plant. The record does not reveal any details regarding the sale by MP&L to LP&L when it does cross the Mississippi/Louisiana line on the 500

Kv line in question. There is no revelation as to the manner or the means of sale of electricity that might return to Mississippi from Louisiana through the Bogalusa substation. We are forced to conclude in this area, the lower court had ample reason to find that any future benefit of the line in question to Mississippi resident rate payers is highly speculative and something that might possibly materialize in the future.

The eminent domain court judge held that the granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Mississippi Constitution Article 3, Section 17. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from Grand Gulf to Louisiana. The

order of the MPSC stated that it was granting appellant's application "to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation."

We already have discussed and quoted pertinent parts of Judge Pigott's dismissal order. It should be remembered that appellant made the order of the MPSC a part of its condemnation petitions. We cannot disagree with Judge Pigott that this part of the condemnation proceedings wherein the MPSC granted its permission for "intrastate sales" was not a valid order.

Reiterating -- Judge Pigott was in the seldom occurring situation of being the finder of facts when those facts are disputed or contradictory. We find that under the facts before him, Judge Pigott had ample reasons to find as a fact that "no Mississippi customer would be served off the transmission line in question."

And . . . "the primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line."

The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA § 11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for "public use" and was not "in law a public use for which private property may be taken or damaged."

Even though Judge Pigott went further and held that MPSC erroneously labeled the line "interstate", the opinion still conforms to the requirements of § 11-27-15. We agree that MPSC was in error in making

the line "intrastate" but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms "public necessity" and "public use" as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizen rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base.

We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action.

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR. PATTERSON, C.J., NOT PARTICIPATING.

APPENDIX G

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

January 14, 1985

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Mississippi Power & Light Company, the Appellant above-named, hereby appeals to

the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi affirming the dismissal of the petition of eminent domain entered in this proceeding on December 12, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

MISSISSIPPI POWER & LIGHT COMPANY

BY: /s/ Charles T. Ozier
CHARLES T. OZIER
DAVID W. CLARK
F. HALL BAILEY

ATTORNEYS FOR APPELLANT, MISSISSIPPI POWER & LIGHT COMPANY

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Professional Association
600 Heritage Building
Post Office Box 651
Jackson, Mississippi 39205
(601) 354-2385

OF COUNSEL

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal, to the following:

Hon. Delos Burks
Stewart, Burks & Pace
Stewart Building
111 East Canal Street
Picayune, Mississippi 39466

THIS the 14th day of January, 1985.

/s/ Charles T. Ozier
CHARLES T. OZIER

Office-Supreme Court, U.S.
FILED
APR 29 1985
ALEXANDER L. STEVAS,
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No. 84-1454

In The

Supreme Court of the United States

October Term, 1985

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MISSISSIPPI POWER & LIGHT COMPANY

Appellant,

v.

LOUIS A. CONERLY, ET ALS

Appellees

—0—

On Appeal from the Supreme Court of Mississippi

—0—

APPELLEES', LOUIS A. CONERLY, ET ALS', MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

—0—

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Attorneys for Appellees

April 28, 1985

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81 pp

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

The Appellees, Louis A. Conerly and wife, Gwendolyn R. Conerly, Lyndell R. Rushing and wife, Frances S. Rushing, Merwin D. Wood and wife, Sarah T. Wood, Ronald Mentel and wife, Judith L. Mentel, by their undersigned attorneys, move to dismiss the appeal of Appellant, Mississippi Power & Light Company. In the alternative, Appellees move to affirm the December 12, 1984, decision by the Supreme Court of the State of Mississippi, as provided by Rule 16 of the United States Supreme Court Rules.

I. OBJECT

It is Appellees' contention that Appellant's case does not present a substantial federal question, and its appeal is not within the purview or in conformity with 28 U.S.C. 1257(2), or Rule 10 of the United States Supreme Court Rules.

Appellees respectfully submit that Appellant failed to timely raise, plead, present, argue, or preserve for appeal purposes a federal question of any type in its pleadings or arguments in the Special Court of Eminent

Domain or in the Supreme Court of the State of Mississippi. Thence, neither of the two state courts had before it the alleged federal questions Appellant is raising for the first time on its appeal under the provisions of 28 U.S.C. 1257(2).

It is readily apparent that Appellant never timely challenged the constitutionality of §11-27-15, §11-27-47, and §77-3-67 of the Mississippi Code of 1972, as amended, on the ground that they are repugnant to the Constitution of the United States. On the other hand, the Supreme Court of Mississippi, on November 1, 1978, determined that §11-27-1, et seq, being the eminent domain statutes, were constitutional. See Jackson Redevelopment Authority v King, Inc., Miss. 364 So.2d 1104.

The Appellant relied upon these now challenged statutes as its vehicle and legal authority for filing of Appellant's original suits in the Special Court of Eminent Domain of Walthall County, Mississippi, and also when it appealed this case to the Mississippi Supreme Court.

Now it appears from reading the Jurisdictional Statement and Appendix to Jurisdictional Statement by Appellant that the Appellant has now completely reversed

its original position of having relied upon the eminent domain statutes to condemn Appellees' lands. How can Appellant invoke the Court's aid and protection because of the aforesaid eminent domain sections, and then having lost its case can now contend that the aforesaid sections are repugnant to the Constitution of the United States?

II. NO SUBSTANTIAL FEDERAL QUESTION

This appeal does not present any substantial federal question or questions. The federal questions sought to be reviewed by Appellant were neither timely nor properly raised, nor expressly passed on by the Mississippi Supreme Court. The judgment of the Mississippi State Supreme Court squarely rests upon an adequate nonfederal grounds.

The grounds raised by Appellant for this appeal are frivolous and without merit. The appeal by Appellant requests a review on such general and vague grounds so as to ask this Honorable Court to merely second-guess the Mississippi Supreme Court on the merits of this case. Additionally, there being no good reason in law or facts for this appeal, allowance of Appellant jurisdiction in this case would waste time, effort and expense on an

already overcrowded docket. Furthermore, the Appellant's request for granting of a Writ of Certiorari pursuant to 28 U.S.C. §2103 is also without merit.

III. WHY THIS APPEAL SHOULD BE DISMISSED

The appeal is not within the jurisdiction of this court because it is not taken in conformity with 28 U.S.C. 1257(2) which states,

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. (Emphasis supplied)

Appellant expressly relies on this statute as one of its two bases for this appeal (See Appellant's Jurisdictional Statement pp. 1 and 3). The only statutes mentioned in a text of the State Supreme Court's opinion are §77-3-11, §11-27-2, et seq., §11-27-47, §11-27-15, §77-3-5, §77-3-67, §77-3-47 (M.C.A. 1972) and Article 3, Section 17, Mississippi Constitution 1890.

Nowhere was the validity of these or any other state statutes mentioned in the opinion of the state court, drawn in question, as to being repugnant to the Constitution, treaties, or laws of the United States.

Appellant failed to make a presentation why it is contended there are raised substantial federal questions so as to bring the case into the jurisdiction of this court for plenary consideration, nor cites legal precedents to support such jurisdiction. Supreme Court Rule 10 requires such citations.

For these reasons also, as is apparent from the state court's opinion, the judgment of the state court rests on adequate non-federal bases, namely, as follows:

> "The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA §11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for 'public use' and was not 'in law a public use for which private property may be taken or damaged.'"
>
> "Even though Judge Pigott went further and held that MPSC erroneously labeled the line 'intrastate', the opinion still conforms to the requirements of §11-27-15. We agree that MPSC was in error in making the line 'intrastate' but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms 'public necessity' and 'public use' as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizens rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base."
>
> "We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action."

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR. PATTERSON, C.J., NOT PARTICIPATING."

In reading the state court's opinion and Appellant's Jurisdictional Statement, it becomes clear that the reasons cited by Appellant for appeal are not valid ones, and that Appellant is merely pinning its hopes for a technical and arbitrary reversal of an opinion on this court's taking jurisdiction of the case in full.

For the foregoing reasons, the appeal in this case should be dismissed as completely lacking jurisdiction.

IV. CONCLUSION

Appellant has sought to bring an unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements, and because it is not taken in conformity with Statute 28 U.S.C. 1257(2) or within the Supreme Court Rules. Further, that the appeal does not present a substantial federal question, or further, that the federal questions sought to be reviewed by Appellant was not timely or properly raised and was not expressly ruled upon by the Mississippi Supreme Court, and further that the Judgment of the Mississippi Supreme Court rests upon adequate non-federal bases. The contention by

Appellant that this opinion denies Appellant the due process of law in violation of the Fourteenth Amendment, and further that it violates Article I, Section 8, Clause 4 of the Fourteenth Amendment to the Constitution of the United States presents no substantial federal questions. There is a presumption that the state court properly decided this case. Appellees request that this Court take notice of the fact that the Appellant has now reversed its original position in this litigation by now asking this Court to declare the eminent domain statutes of the State of Mississippi repugnant to the Constitution of the United States. This was not and has not been done by the Mississippi Supreme Court in this case. Appellees Motion to Dismiss, or in the Alternative to Affirm in this matter should be sustained. Appellees request this pursuant to Rule 16.1(d) of the rules. Further that all costs should be assessed against Appellant.

IT IS SO MOVED.

Respectfully submitted,

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C E R T I F I C A T E

I, Delos H. Burks, Attorney for Appellees, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Appellees' Motion to Dismiss, or in the Alternative, to Affirm the Decision of the Supreme Court of Mississippi to the Honorable Charles T. Ozier of Wise, Carter, Child & Caraway, Post Office Box 651, Jackson, Mississippi 39205, Attorney for Appellant.

THIS, the 27th day of April, 1985.

Delos H. Burks
By: Anna A. Carroll
DELOS H. BURKS

No. 84-1454

In The

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MISSISSIPPI POWER & LIGHT COMPANY

Appellant,

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LOUIS A. CONERLY, ET ALS

Appellees,

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On Appeal from the Supreme Court of Mississippi

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APPELLEES' BRIEF SUPPORTING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM THE SUPREME COURT OF MISSISSIPPI

—0—

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April 28, 1985

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APPELLEES' BRIEF SUPPORTING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM THE SUPREME COURT OF MISSISSIPPI

The Appellant, Mississippi Power & Light Company, is basing its appeal within the purviews of 28 U.S.C. 1257(2) which reads as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellant makes a further request that its appeal be likewise considered by writ of certiorari as provided by 28 U.S.C. 1257(3), if the appeal is denied.

This litigation arose when Appellant filed four eminent domain suits in Walthall County, Mississippi, against the four Appellees, as part of a 51-mile link in a high-voltage electric transmission line connecting Appellant with its sister company, Louisiana Power & Light Company domiciled in New Orleans, Louisiana.

The statutory authority for condemnation of Appellees' lands

was shown in paragraph number 3 as Section 11-27-47, Mississippi Code of 1972, annotated. This authority granted to electric power companies was enacted in 1922 and has not been modified as to them to date. On this appeal the Appellant utility company seeks to have its eminent domain authority declared unconstitutional on the grounds of being repugnant to the Constitution of the United States. The state code section is included in full as Appendix "A" to this brief.

Appellees respectfully point out that Appellant did not timely challenge in the trial court the constitutionality of 11-27-47 or two other sections of the Mississippi Code, namely, 11-27-15 and 77-3-67, it now declares are likewise constitutionally repugnant. Appellant's petition for rehearing sought to reverse the state court's unanimous opinion of October 10, 1984, attempted to challenge the statutes' constitutionality.

Appellees respectfully submit that the Supreme Court of Mississippi's opinion of October 10, 1984, and modification thereof on December 12, 1984, have accurately and correctly analyzed and interpreted all state statutes Appellant now seeks to have declared unconstitutional. Those opinions being set out in full in Appellant's

Appendix to Jurisdictional Statement. In the case at bar, the final decision by the state court was correctly decided on state law, and there is a presumption that the Court did its full duty in light of all questions timely raised.

Harrison v NAACP, 79 S.Ct. 360 U.S. 167, 3 L.Ed. 1558

Section 17 of the Mississippi Constitution declares that if a landowner challenges the authority of the condemnor to take land for an alleged "public use", that question is to be decided by the Judiciary and not the Legislature. That section is as follows:

> "Section 17. Private property shall not be taken or damaged for public use, except on due compensation being first made to owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public." SOURCES: 1817 art I § 13; 1832 art I § 13; 1869 art I § 10. (Emphasis supplied)

The Mississippi Legislature completely revamped its eminent domain laws when it enacted Chapter 520, Laws of 1971, which took effect on January 1, 1972. One section added is Section 11-27-15 which Appellant now for the first time on appeal challenges its constitutionality.

This section mandated by the state constitution, supra, affords a landowner three separate grounds to challenge the condemnation proceedings in court by filing a motion to dismiss. Appellees here made their individual motions to dismiss pursuant to this statutory authority, namely:

> "(1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The duly elected, qualified and acting Circuit Judge sitting as Judge of the Special Court of Eminent Domain consolidated the four cases and after a full hearing, found for the four landowners and against the Appellant, Mississippi Power & Light Company. That dismissed order appears in full at pages 23a-29a of Appellant's Jurisdictional Statement. The trial court's order dismissing the four eminent domain suits, said in part:

> "It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co."

"The primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to the Louisiana Power & Light Co. in the State of Louisiana near Bogalusa, Louisiana, ultimately to be extended by Louisiana Power & Light to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line." (Emphasis supplied)

The trial court and the State Supreme Court found and determined that there was no "public necessity" in Mississippi for the erection of the interstate high-powered electric transmission line.

The State Supreme Court affirmed the trial court's conclusions by an unanimous decision of October 10, 1984, and again on December 12, 1984, in denying Mississippi Power & Light Company's petition for rehearing.

Appellees' respectfully submit that the Appellant lost its cases of factual grounds after having the state laws and state constitution properly applied, and there is no "substantial federal question" upon which its appeal can lie.

Appellant has improperly included in its Jurisdictional Statement a copy of an eminent domain judgment in the case of Mississippi Power & Light Company vs Jewell D. Thomas and Francis W. Thomas, Cause No. 3823, entered August 19, 1983. Appellees' respectfully point

out that this judgment has absolutely nothing to do with Appellees' consolidated cases on appeal, as it is not in the transcript of the trial court and was not before the State Supreme Court on appeal. A copy was included in Appellant's petition for rehearing only. It is elementary law that no appellate court may consider or act upon any documents, exhibits, et cetera, which are not shown by the trial court record. See Shelton v Kindred, Miss. 279 So.2d 642 (1973), in part:

> "(3) The burden rested upon appellant to see to it that the record contained all data essential to an understanding and presentation of matters relied upon for reversal on appeal. Willenbrock v. Brown, 239 So.2d 922 (Miss. 1970).
>
> "(4-6) This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record. It must be presumed that the rulings of the trial court were correct, and such presumption will prevail, unless the actual record supports the contrary view."

Likewise, in McGowan v. McGowan, Miss. 357 So.2d 946 (1978), at page 950:

> "Finally, this Court cannot consider matters not properly a part of the record. Certain remarks attributed to the chancellor and not made a part of the record come within that category. This fact is not altered by their inclusion in appellant's petition for rehearing filed in the Chancery court after the case had been removed to this Court on appearl."

In St. Louis Fire & Marine Ins. Co. v. Lewis, Miss. 230 So.2d 580 (1970):

> "It is well settled that we will not consider statements of facts contained in briefs of counsel, but that we must confine ourselves to the facts as shown by the record."

Appellees respectfully request that the Thomas judgment be stricken from Appellant's Jurisdictional Statement as being outside the record below and is a desperation effort by Appellant to prejudice Appellees' rights under law.

NO SUBSTANTIAL FEDERAL QUESTION

It is Appellees' contentions that the eminent domain laws, and laws governing the state's public service commission in the State of Mississippi, were correctly interpreted by the State Supreme Court's unanimous opinions of October 10 and December 12, 1984, and no substantial federal questions are before the Supreme Court of the United States. In other words, no federal right was denied Mississippi Power & Light Company in its unsuccessful litigation efforts to condemn Appellees' lands as part of a 51-mile link to connect subsidiary electric power corporation facilities of different states.

To the contrary, Appellees contend that the highest appellate court of Mississippi correctly applied its

constitution and laws appertaining to a sovereign state's power of eminent domain. Moreover, the State Supreme Court's decision makes a prima facie case that it was not based on a federal question as contemplated by 28 U.S.C. 1257 (2). Appellees' further contend that such authority is a grant from the Legislature and may be withdrawn at any time provided all private corporations are accorded the same treatment.

In Stone v. Southern Illinois & Mo. Bridge Co., 206 U.S. 267, 51 L. Ed. 1057, a case dealing with powers of eminent domain, we find:

> "These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the state supreme court.
> "There is no contention that the statutes conferring the right of eminent domain, passed by the legislature of the state of Missouri, and which its courts have decided authorize this appropriation by the defendant in error, do not make ample provisions for assessment of damages to the landowner by due process of law. Whether a given corporation comes within the law of the state and is entitled to assert its power, presents only a question of state law." (Emphasis supplied)

Another case dealing with state statutes on eminent domain and removal to federal court under diversity of citizenship of the parties, was Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 49 L.Ed.462,

Mr. Justice Harlan writing for the majority, said in part:

> "Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the state may not prescribe any mode of taking private property for a public purpose, and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a circuit court of the United States a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different states." (Emphasis supplied)

Mr. Justice Holmes writing for a dissenting minority, wrote in part:

> "It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the state to determine. "There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American juris-prudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments." (Emphasis supplied)

In Louisiana Power & Light Company v. City of Thibodaux, 360 U.S. 25, 3L Ed 2d 1058, 79 S. Ct. 1070 (1959), Mr. Justice Frankfurter's majority opinion

emphasized that state courts are the proper tribunel to interpret and apply state eminent domain statutes. In part, he wrote at headnotes 3-7, as follows:

> "Although an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law,' Kohl v United States, 91 US 367, 375, 376, 23 L ed 449, 452, it is of a special and peculiar nature. Mr. Justice Holmes set forth one differentiating characteristic of eminent domain: it is intimately involved with sovereign prerogative. And when, as here, a city's power to condemn is challenged, a further aspect of sovereignty is introduced. A determination of the nature and extent of delegation of the power of eminent domain concerns the apportionment of governmental powers between City and State. The issues normally turn on legislation with much local variation interpreted in local settings. The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court.
>
> (360 US29)
>
> "The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitely--the courts of the State under whose statute eminent domain is sought to be exercised--rather than himself make a dubious and tentative forecast. This course does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition. Eventually the District Court will award compensation if the taking is sustained. If for some

> reason a declaratory judgment is not promptly sought from the state courts and obtained within a reasonable time, the District Court, having retained complete control of the litigation, will doubtless assert it to decide also the question of the meaning of the state statute. The justification for this power, to be exercised within the indicated limits, lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." (Emphasis supplied)

Appellees respectfully submit that the Appellant's attempted appeal under 28 U.S.C. 1257(2) or 1257(3) failed to note its failure to timely raise the alleged federal questions in the state courts below. Appellant's brief claims a denial of 14th Amendment rights. However, Pierre v. State of Louisiana, 59 S.Ct. 536, 306 U.S. 354, 83 L. Ed. 757 (1939) clearly holds that such alleged denial had to be timely raised and subject to revision by the State Supreme Court. Appellant cites as its authority to raise a constitutional question in its petition for rehearing, the 1932 case of Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct 145, 287 U.S. 358, 77 L.Ed. 360. It is respectfully submitted that Appellant's case is inconsistent with Cardinale v. Louisiana, infra, a 1969 decision, and legions of other cases since 1932.

Appellant has challenged the constitutionality of Section 11-27-15, Mississippi Code of 1972 enacted in 1971, which among other things provide three specific grounds for a landowner to challenge in court the condemning authority's eminent domain proceedings.

This Court may be interested in the different versions of eminent domain provisions in the Mississippi Constitutions of 1817, 1832, 1869, and the current 1890 version. All four contain the words "public use". The first version required the consent of "his representatives". The second version required the consent of "the Legislature". The third or 1869 version provided that condemnation of land for public use permitted it to be done "in a manner to be provided by law".

It should be noted that the 1890 and present Section 17 of the Mississippi Constitution on eminent domain, specifically declared for the first time that if the alleged "public use" was questioned by the landowner, that would be a "judicial question".

The 1971 recodification of Mississippi's eminent domain laws added a third legal remedy or cause to challenge such a condemnation suit. This third ground tracks the requirements of Section 17 of the Mississippi Constitution.

The 1971 Legislature didn't require the landowner to challenge an eminent domain proceeding before the Public Service Commission, State Building Commission, municipalities, Board of Supervisors, Pat Harrison Waterway District, or before other entities granted the power of eminent domain.

The 1971 dismissal section, 11-27-15, clearly provides for making a motion to dismiss directly in the Special Court presided over by a County Judge or a Circuit Judge (in a county with no County court). The Legislature recognized two things, first, Section 17 of the State Constitution required a questioned "public use" to be decided as a "judicial question", not a Legislative, Executive, or Public Service Corporation question.

The 1971 Legislature knew that only a court of law, i.e., an elected trial judge, had the authority to decide a judicial question without a jury. It is elementary law that a "judicial" question proper for the determination by a court of justice, as distinguished from "legislative" question or "political" question in the executive branch of government.

For Mississippi Power & Light Company to argue that a Circuit Judge presiding over a Special Court of Eminent Domain, as in the case at bar, is powerless to

consider and decide a collateral attack under the authority of Section 11-27-15, is to completely ignore the 1971 revised eminent domain act.

The trial court found and determined that the 51-mile link of 500kv line was a part of an interstate line and that it will serve no Mississippi customer of Mississippi Power & Light Company; the construction of the line leading to New Orleans, Louisiana, is solely for interstate business and the sales are an interstate commerce. The court concluded that the Mississippi Public Service Commission had exceeded its statutory authority and jurisdiction in awarding a Certificate of Public Convenience to construct the link of transmission line, and that the four eminent domain cases should be dismissed.

U.S. Supreme Court Rule 71A(k) even requires federal eminent domain proceeding as well as diversity of citizenship suits in U.S. District Courts, to be tried pursuant to the laws of the states. On the third page of Subdivision (k) (page 71A 597) we find:

> (3) Condemnation Under a State's Power of Eminent Domain. Subdivision (k) provides:
> "The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state makes provisions for trial of any issue by jury, or for trial of

the issue of compensation by jury or commission or both, that provision shall be followed."

"Rule 71A came into existence primarily to provide a modern and simple procedure, in lieu of conformity to state practice, for actions involving the federal power of eminent domain, most of which are brought by the United States.[1] A few condemnation actions involving the exercise of state power do, however, reach the federal court usually on the basis of diversity.[2] The purpose of subdivision (k) is to make the practice of Rule 71A applicable to these actions, except as to mode of trial. Here there is to be conformity to state law."

Traditionally, the United States Supreme Court have denied appeals from the decision of a state's highest appellate court, and those granted involved diversity of citizenship cases appear to have decided that the state statutes granting eminent domain authority should prevail. The only exception being that a state's statute denied a litigant due process of law under the 14th Amendment.

Another cardinal legal issue on this appeal is that the Supreme Court will not decide federal constitutional issues raised for the first time on a review of state court decisions. See Cardinale V. Louisiana, 89 S. Ct. 1162, 394 U.S. 437, 22 L. Ed. 2d 398 (1969).

In the case at bar, Mississippi Power & Light Company never raised a constitutional issue or a federal

question in the trial court or state supreme court until it filed a petition for rehearing following an October 10, 1984, unanimous decision adverse to the company who was Appellant there and here.

Appellant also challenges the constitutionality of a Mississippi Public Service Commission statute, namely, Section 77-3-67, Mississippi Code of 1972. This statute, among other things, provides that any party aggrieved by an order or decision of the state public service commission, could effect an appeal within 30 days to the Chancery Court. This appeal provision was enacted in 1956 and reenacted in 1978. Appellant contends that the four landowners (all residents of Louisiana) failed to appeal within 30 days of the commission's 1981 order granting a Certificate of Public Convenience and Necessity to construct the 51-mile line of an interstate electric transmission line. Appellant argued below that Appellees failed to appeal from the Public Service Commission order and, thence, were not entitled to collaterally attack that certificate order before the trial court as the 1971 Legislature clearly said could be done. The State Supreme Court concluded that the four landowners could not appeal from an order of which

they had no due process notice or other notice of a Public Service Commission proceeding. Mr. Justice Bowling, writing for an unanimous State Supreme Court, said in part:

> "Admittedly, appellee landowners in Walthall County received no notice of the 'hearing' before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 280, 9 L. Ed. 2d 255, 83 S. Ct. 279, (1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L. Ed 2d 178, 77 S. Ct. 200 (1956)."

In effect, Appellant would deny Appellees the constitutional rights of due process of law, by requiring them to appeal from a state agency ex parte proceeding order, without any notice whatsoever to them as freeholders whose lands were in the path of an interstate power line. Moreover, Appellants would deny these landowners their right given them by the 1971 Legislature to collaterally attack such order in an eminent domain suit relying upon such order and to challenge the "public use" as a "judicial question" by an elected Circuit Court Judge.

There is no merit to Appellant's claim of a federal question or substantial federal question, but is merely a "smokescreen" to circumvent an adverse decision by the Supreme Court of the State of Mississippi. The validity of every eminent domain statute survived a constitutional challenge in the case of Jackson Redevelopment Authority v. King, Inc., Miss. 364 So. 2d. 1104 (1978). See headnote 8, 9 and 10.

CONCLUSION

The case of Appellant Mississippi Power & Light Company versus Appellees Louis A. Conerly and wife, Gwendolyn R. Conerly; Lyndell R. Rushing and wife, Frances S. Rushing; Merwin D. Wood and wife, Sarah T. Wood; and Ronald Mentel and wife, Judith L. Mentel, should be dismissed, or alternatively, the decision of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

APPELLEES:

Louis A. Conerly and Gwendolyn R. Conerly
Lyndell R. Rushing and Frances S. Rushing
Merwin D. Wood and Sarah T. Wood
Ronald Mentel and Judith Mentel

Delos H. Burks

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Attorneys for Appellees

CERTIFICATE

I, Delos H. Burks, Attorney for Appellees, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Appellees' Brief Supporting Motion to Dismiss, or in the Alternative, Motion to Affirm the Supreme Court of Mississippi to the Honorable Charles T. Ozier of Wise, Carter, Child & Caraway, Post Office Box 651, Jackson, Mississippi 39205, Attorney for Appellant.

THIS, the 27th day of April, 1985.

Delos H. Burks
By: anna a. Carroll
DELOS H. BURKS

§ 11-27-45. Power lines across railroads.

All companies, or associations of persons incorporated or organized for the purposes set forth in section 11-27-41 may acquire a right-of-way across railroads by condemnation by the exercise of such right of eminent domain. If a right-of-way across a railroad has been condemned by a hydroelectric company, as herein defined, the railroad company shall be advised of the manner in which said hydroelectric company proposes to erect its poles and string its wires and conductors, and if the railroad company shall object thereto, the public service commission shall have jurisdiction upon complaint filed with it by the railroad company to enter an order directing how the poles, wires and conductors shall be constructed, and the railroad shall be crossed as ordered and in no other manner.

SOURCES: Codes, 1942, § 2749-23; Laws, 1971, ch. 520, § 23, eff from and after January 1, 1972.

§ 11-27-47. Pipelines.

All companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the State of Mississippi, or natural gas districts, incorporated or organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances, for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipelines and appliances along or across highways, waters, railroads, canals, and public lands, above or below ground, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals, and public lands. The board of supervisors of any county through which any such line may pass shall have the power to regulate, within its respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county. All such companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof.

EXHIBIT "A"

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 84-1454

MISSISSIPPI POWER & LIGHT COMPANY

Appellant

vs.

LOUIS A. CONERLY, ET AL

Appellees

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I.

THE FEDERAL QUESTIONS WERE TIMELY RAISED

Appellees state that the Appellant failed to timely raise the federal questions in this case and that, therefore, this Court should refuse to invoke its jurisdiction. It is clear that this argument is without merit.

This Court consistently has recognized that a constitutional issue may be raised for the first time in the petition for rehearing when the state court decision provides a new and unexpected basis for asserting the constitutional claim. Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932); Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 633 (1930); Missouri Ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930). Recent decisions of this Court demonstrate the continued validity of this principle. See Pruneyard Shopping

Center v. Robins, 447 U.S. 74, 87 (1980) (federal claims are "adequately presented even though not raised in lower state court, when the higher state court renders an unexpected interpretation of state law, citing Brinkerhoff and Gehner); Wilson v. Aiken Industries, Inc., 439 U.S. 877 (1978) (Blackman, J., concurring) (citing Great Northern); Bohannan v. Arizona, 398 U.S. 1, 4 (1967) (citing Brinkerhoff). As noted in the Appellant's Jurisdictional Statement (at p. 10), this principle has been applied when the state court decision gave a statute a new construction which, for the first time, brought it in conflict with the United States Constitution. See, Bohannan, 398 U.S. at 4; Herndon v. Georgia, 295 U.S. 441, 442 (1935).

It is undisputed that the present case comes within this rule. In dismissing the condemnation petitions, the lower court plainly based its decision on the Mississippi Public Service Commission's

lack of jurisdiction over the proposed interstate transmission line. In Appellees' brief in support of their Motion To Dismiss Or Affirm, the Appellees concede this, correctly pointing out that

> The trial court found and determined that the 51 mile length of 500 KV line was a part of an interstate line and that it will serve no Mississippi customer of Mississippi Power & Light Company; the construction of the line leading to New Orleans, Louisiana, is solely for interstate business and the sales are in interstate commerce. The Court concluded that the Mississippi Public Service Commission had exceeded its statutory authority and jurisdiction in awarding a certificate of public convenience to construct the link of transmission line, and that the four eminent domain cases should be dismissed. (Emphasis added). Appellees' Brief at 14.

It is clear that the lower court did not interpret, analyze, or any way base its decision on the provisions contained in Section 11-27-15.

Similarly, Appellees do not dispute that in its decision on October 10, 1984, the Mississippi Supreme Court for the first time interpreted the terms "public

use" and "public necessity" in Section 11-27-15 as "contemplat[ing] use by the citizens of this state." It is this interpretation of Section 11-27-15 that renders the statute unconstitutional by effectively prohibiting any utility from constructing a transmission line to transmit electricity out of state. It was also this decision by the state supreme court which, again, for the first time, interpreted § 11-27-15 as permitting plenary consideration of a Public Service Commission ruling in a collateral proceeding -- a review greater than that allowed by Section 77-3-67. It is clear that it was not until after this decision by the Mississippi Supreme Court that Appellant could attack Section 11-27-15 on federal constitutional grounds.

Appellees do not contest any of these points, all of which were discussed by the Appellant in its jurisdictional statement. The Appellees effectively concede that the

Appellant raised the constitutional issues at the first opportunity. The Appellees dispute only that an issue raised in the petition for rehearing can ever be considered timely. In support of their position, Appellees cite Cardinale v. Louisiana, 394 U.S. 437 (1969), and argue that Great Northern is inconsistent with the more recent Cardinale decision. In Cardinale, the petitioner raised a constitutional objection to a Louisiana statute for the first time in his appeal to the United States Supreme Court. Since the petitioner had failed to raise the constitutional issue "in any way below," this Court ruled that the federal question was not properly before it. 394 U.S. at 439.

In contrast, in Great Northern, as in the present case, the federal question was raised in the petition for rehearing to the state supreme court, before the appeal to the U.S. Supreme Court. This Court held that the issue was timely asserted

since it was raised at the first opportunity. It is clear that Cardinale and Great Northern are not inconsistent decisions. Moreover, as indicated above, recent decisions of this Court decided since Cardinale have recognized the continued validity of Great Northern and the principle applied in that case.

Appellees have never disputed the fact that prior to the Mississippi Supreme Court decision on October 10, 1984, Appellant could not have raised any constitutional objections to Section 11-27-15. On appeal, one cannot assume that a state appellate court will introduce new and unconstitutional interpretations of state law. The Appellees also admit that Appellant raised the constitutional questions in its petition for rehearing. See Appellees Brief at 2, 15-16. Since the Appellant raised the federal questions at the first opportunity, these issues are properly before the Court.

II.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The Appellees also claim that the present case does not involve any substantial Federal questions. However, the basis for this contention, if any, is unclear. Appellees make no effort to respond to Appellant's claim that Section 11-27-15 is unconstitutional because it places an impermissible burden on interstate commerce. Similarly, Appellees make limit effort to address the due process claim discussed in Appellant's Jurisdictional Statement. Instead, Appellees emphasize that the Mississippi Supreme Court correctly analyzed and interpreted the state statutes. Consequently, Appellees conclude, since the eminent domain statutes involve questions of state law, this case cannot involve any Federal questions.

This argument illustrates Appellees' misunderstanding of or concession to Appellant's arguments on this appeal. The question before the Court is not whether the Mississippi Supreme Court correctly applied and interpreted the state eminent domain statutes. As the state court of last resort, the Supreme Court of Mississippi's statutory interpretations necessarily are the "correct" ones, or at least the only ones that matter. The question that is before the Court is whether the statutes themselves, as interpreted by the state Supreme Court, are in conflict with the United States Constitution. The fact that the statutes in this case involve an area of state concern does not, as Appellees attempt to suggest, remove it from the constitutional scrutiny of this Court. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Milliken v. Bradley, 418 U.S. 717, 744 (1974). It is a basic principle of constitutional law

that any state provision in conflict with the United States Constitution is invalid. U.S. Const. Art. VI. Cl. 2. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This fundamental rule applies equally to eminent domain statutes. See West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

The Appellee's reliance on Jackson Redevelopment Authority v. King, Inc., 364 So.2d 1104 (1978) is also misplaced. The fact that the Mississippi Supreme Court has ruled that the state's eminent domain statutes do not violate the equal protection clause of the Constitution is neither binding on this Court or relevant to the issues presented on this appeal. See Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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